

George Wentz, Jr. (*Pro hac vice*)
The Davillier Law Group, LLC
414 Church St Suite 308
Sandpoint, ID 83864
208-920-6140
Email: gwentz@davillierlawgroup.com

Alexander Kolodin (SBN 030826)
Arno Naeckel (SBN 026158)
The Davillier Law Group LLC
3443 N. Central Ave., Suite 1009
Phoenix, AZ 85012
620-730-2985
Email: akolodin@davillierlawgroup.com
anaeckel@davillierlawgroup.com
phxadmin@davillierlawgroup.com (file copies)

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ryan Cox, individually and on behalf of all
others similarly situated,

Plaintiff,

vs.

CoinMarketCap OpCo, LLC, Binance
Capital Management Co., Ltd. d/b/a Binance
and Binance.com, BAM Trading Services
Inc. d/b/a Binance.US, Changpeng Zhao,
Catherine Coley, Yi He, Ted Lin, and Does
I-X;

Defendants.

Case No.: 3:21-cv-08197-SMB

**PLAINTIFFS' OPPOSITION TO
MOTION TO DISMISS FOR LACK OF
SERVICE**

Plaintiff, Ryan Cox *et al.*, by and through his attorneys, Arno Naeckel and the
Davillier Law Group LLC, respectfully requests this Honorable Court deny Defendant

1 Catherine Coley's Motion to Dismiss for Lack of Service of December 15, 2021, Docket
2 Entry #32, based upon the argument below:

3
4 **FACTS**

5 On December 10, 2021, Plaintiffs filed its Motion for Extension of Time to Serve
6 Defendants Zhao, Coley, He, and Lin. [DE 27].

7 Also on December 10, 2021, Plaintiffs filed an Affidavit of Service by
8 Publication, demonstrating that service had been perfected by publishing the summons
9 and a statement describing how a copy of the pleading being served may be obtained
10 once a week for four weeks, on November 19, 2021, November 26, 2021, December 3,
11 2021, and December 10, 2021 [DE 28].

12 On December 15, 2021, Defendant Catherine Coley filed her Motion to Dismiss
13 for Lack of Service. [DE 32].

14 On December 16, this Court entered an order granting Plaintiff's Motion for
15 Extension of Time and setting the deadline for Plaintiffs to perfect service upon
16 Defendants Changpeng Zhao, Catherine Coley, Yi He, and Ted Lin as sixty days after
17 the Court's order denying Plaintiff's Motion for Alternative Service via Social Media,
18 which was December 14, 2021. [DE 33]; [DE 29]. The deadline for Plaintiffs to perfect
19 service upon Defendant Catherine Coley is therefore Monday, February 14, 2022.
20
21
22
23

24 **LEGAL STANDARD**

25 Ariz. R. Civ. P. 4.2(f)(1) provides a party may serve by publication only if
26

27 (A) the last-known address of the person to be served is outside Arizona but:
28 (i) the serving party, despite reasonably diligent efforts, has not been able to
ascertain the person's current address; or

(ii) the person has intentionally avoided service of process; and
 (B) service by publication is the best means practicable in the circumstances for providing notice to the person of the action's commencement.

Service is accomplished by publishing the summons and “a statement describing how a copy of the pleading being served may be obtained at least once a week for 4 successive weeks in a newspaper published in the county where the action is pending.” Ariz. R. Civ. P. 4.2(f)(2)(A). The party making service must prepare an affidavit which, if in compliance with the requirements, constitutes prima facie evidence of compliance with the requirements for service by publication. Ariz. R. Civ. P. 4.2(f)(4).

“Rule 12(b)(5) allows a party to move to dismiss claims against it for insufficient service of process.” *Kinsey v. Dep’t of Veterans Affs.*, 2019 WL 4228478, at *2 (D. Ariz. Sept. 5, 2019) (Brnovich, J.). Fed. R. Civ. P. 4(m) provides 90 days to serve defendants after a complaint is filed, and that “the court must dismiss the action without prejudice or order that service be made within a specified time;” however, if “the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m).

ARGUMENT

A. Defendant Coley has been served by publication.

The affidavit from Plaintiffs’ investigator, Dave Zinn [DE 24-1] demonstrates clearly that the serving party has not been able to “ascertain the person’s current address.” Contrary to the arguments of Defendant Coley, a list of possible addresses of family and relatives, without any certainty or additional information to clarify whether the

1 addresses are related or not, does not constitute ascertainment of Defendant Coley's
2 address. The list of possible phone numbers, aliases, and relatives, without any
3 confirmed information, demonstrates the reasonable diligence of the Plaintiffs in
4 attempting to locate Defendant Coley. Defendant Coley cites to *Furst v. Mayne* in
5 support of its proposition, but in that case, the court was focused on the fact that the
6 plaintiffs there had "successfully served Linda in a different case at her Idaho residence
7 on November 5, 2020, well within the service deadline for this case," and so it was
8 clearly unreasonable to say her address was unknown for the case in question. *Furst v.*
9 *Mayne*, No. CV-20-01651-PHX-DLR, 2021 U.S. Dist. LEXIS 128801, at *5 (D. Ariz.
10 Jan. 29, 2021). Even so, the court in *Furst* denied those defendants' motion to dismiss
11 and extended the deadline for service. *Id.*, at *7. Here, diligent investigation has turned
12 up no confirmed information, only speculation, and thus service by publication is an
13 acceptable alternative.

14 The statute in question, Ariz. R. Civ. P. 4.2(f)(1)(A) permits service by
15 publication if the serving party has not been able to ascertain the person's current address
16 or the person has intentionally avoided service of process. Plaintiffs allege, and provided
17 the investigator's report as proof, that they have not been able to ascertain Defendant
18 Coley's current address. Further, the lack of any confirmed addresses belies Defendant
19 Coley's contention that the statute required mailing of a copy of the pleading in addition
20 to service by publication. Defendant Coley alleges that the affidavit is silent on the
21 matter of mailing efforts, but the affidavit does include information that Catherine
22
23
24
25
26
27
28

1 Coley’s address is unknown in the information that was published for four consecutive
2 weeks in the Arizona Capitol Times.

3
4 Finally, Defendant Coley argues from Ariz. R. Civ. P. 4.2(f)(2)(D) that service
5 of process would not be effective under this method until January 9, 2022. Defendant
6 Coley acknowledges a different possible date in a footnote, which is in fact the accurate
7 reading of the statute, which states that service of process by publication is complete
8 “30 days after the summons and statement is *first published*.” Ariz. R. Civ. P.
9 4.2(f)(2)(D). December 19, 2021 is when service was perfected, within the time granted
10 by this Court upon Plaintiffs’ request for an extension.
11

12
13 **B. Service by publication has fulfilled minimum notice requirements.**

14 “[P]ublication satisfies due process minimum notice requirements if it is the best
15 means of notice under the circumstances and it is reasonably calculated to apprise the
16 interested parties of the pendency of the action. *Master Fin., Inc. v. Woodburn*, 208 Ariz.
17 70, 73, 90 P.3d 1236, 1239 (Ct. App. 2004).
18

19 Indeed, Defendant Coley has appeared through counsel, demonstrating that,
20 whatever Defendant Coley’s arguments as to due process, actual notice of the
21 proceedings, and therefore the opportunity “to apprise interested parties of the pendency
22 of the action and afford them an opportunity to present their objections” has been
23 provided. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652,
24 657 (1950).
25
26

27 Given the circumstances as outlined in the Complaint—those of stateless
28 individuals living without established footprint due to their cryptocurrency holdings—

1 service by publication is, under the circumstances, the best means of notice due to the
2 uncertain nature of any of the findings of the investigation.

3
4 **C. This Court found good cause for an extension.**

5 Defendant Coley finally argues that Plaintiff does not have good cause for not
6 yet perfecting service. However, this Court, upon Plaintiffs' request for additional time
7 to serve Defendants Changpeng Zhao, Catherine Coley, Yi He, and Ted Lin, found good
8 cause for an extension of time and granted it, giving Plaintiffs until February 14, 2022
9 to perfect service upon these Defendants. As such, Defendant Coley's arguments that
10 she has not been served are moot, as the Court has granted additional time. Defendant
11 Coley's argument that good cause does not exist has been rejected by this Court in this
12 Court's finding of good cause.

13
14
15 There now remain approximately one and a half months for service of process
16 upon Catherine Coley. Plaintiffs may elect service by a variety of methods as established
17 by local rules and the Federal Rules of Civil Procedure. If, at such time as service is
18 perfected, Defendant Coley contests its adequacy, that argument could be made at the
19 proper time. For the present, however, Plaintiffs respectfully request this Court deny
20 Defendant Catherine Coley's Motion to Dismiss for Lack of Service.

21
22
23 Respectfully submitted this 29th day of December, 2021.

24
25
26 /s/ Arno Naeckel
27 Arno Naeckel
28 DAVILLIER LAW GROUP, LLC
3443 N. Central Ave. Ste 1009
Phoenix, AZ 85012

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion, which is 6 pages, does not exceed the page limit set forth by LRCiv 7.2(e)(1) of 17 pages.

Dated this 29th day of December, 2021.

/s/ Arno Naeckel

Arno Naeckel
DAVILLIER LAW GROUP, LLC
3443 N. Central Ave. Ste 1009
Phoenix, AZ 85012

CERTIFICATE OF SERVICE

I hereby certify that on December 29th, 2021, I electronically submitted the foregoing document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

Dated this 29th day of December, 2021.

/s/ Arno Naeckel

Arno Naeckel
DAVILLIER LAW GROUP, LLC
3443 N. Central Ave. Ste 1009
Phoenix, AZ 85012